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No. 88-2050

IN THE

# Supreme Court of the United States

OCTOBER TERM 1988

CHICAGO TITLE INSURANCE COMPANY, FIRST AMERICAN TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, SAFECO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, AND TICOR TITLE INSURANCE COMPANY,
*Petitioners,*

*v.*

TUCSON UNIFIED SCHOOL DISTRICT AND PHOENIX ELEMENTARY SCHOOL DISTRICT NO. 1,
*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF IN OPPOSITION

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*August 18, 1989*
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## QUESTION PRESENTED

In the class action in the district court, the class representatives did not present, nor did they have standing to present, damage claims based on defendants' violation of Arizona's antitrust laws. Nonetheless, the class action settlement approved by the district court purported to extinguish damage claims arising under Arizona antitrust law. The court also precluded Arizona class members from opting out of the class action so that they could preserve their damage claims arising under state law. When two school districts in Arizona, which had been purported members of the federal class, brought an action in Arizona court under Arizona antitrust law, the district court relied on *res judicata* principles and the doctrine of law of the case to enjoin the school districts from proceeding with the action. The court of appeals reversed because the district court did not have personal jurisdiction over the two Arizona school districts to enter an injunction against them. The question presented by this case is:

> 1. If an absent class member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, must the member either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action?

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*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF IN OPPOSITION

### STATEMENT OF THE CASE

The facts giving rise to the present appeal are set forth in the opinion below and are by this reference incorporated herein. On November 3, 1987, Tucson Unified and Phoenix Elementary filed an antitrust action against six title insurance companies in Arizona Superior Court in

Pima County.[1] The action alleges that defendants violated Arizona's antitrust law by fixing prices for title insurance, and the plaintiff school districts seek to represent a class of Arizona consumers injured by the alleged violation. The basic claim involved in the Arizona action is substantially different from the claim advanced by the class representatives in MDL 633. In the federal action, the class representatives assumed that Arizona law, and the law in all states involved in the case, permitted the title insurance companies to fix prices of title insurance through rating bureaus. With that assumption made, the central issue in MDL 633 was whether the various states actively supervised the title insurance companies' price fixing such that the state action immunity doctrine applied. In contrast, the claim of the Arizona action is that Arizona law does *not* authorize the title insurance companies to fix prices through rating bureaus.[2]

On November 10, 1987, the title insurance companies that had been the defendants in MDL 633 filed a motion with the district court in Philadelphia, requesting the court to enjoin the action in state court in Arizona.[3] The title insurance companies asserted that *res judicata* principles should preclude the state court action. They did not, however, present their *res judicata* argument to the state court

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[1] Complaint, *Tucson Unified School District, et al. v. Chicago Title Insurance Company, et al.*, No. C246527 (Superior Court of Arizona, Pima County, filed Nov. 3, 1987), reprinted in the Appendix to the Petition for Certiorari ("App. to Pet.") at 79a–84a. The defendants in the state court action are the same as the defendants in MDL 633 with one exception. First American Title Insurance Company is not a defendant in the state court action, but its subsidiary, First American Title Insurance Company of Arizona, is a defendant in the state court action.

[2] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 10a n.2.

[3] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 9a–10a.

in Arizona so that it could assess the preclusive effect of the judgment in MDL 633.

In opposition to the request for an injunction, the two school districts contended that the district court in Pennsylvania lacked personal jurisdiction over them. Neither school district had been a party in MDL 633, neither district caused an event to occur in Pennsylvania that would have given the district court personal jurisdiction over them, and neither school district consented to the court's exercise of personal jurisdiction.[4]

In addition, the school districts argued that it was incorrect for the court that entered a judgment in a class action to determine the *res judicata* effect of its own judgment. A subsequent court in the context of a subsequent lawsuit should determine the *res judicata* effect of the federal class action judgment. Moreover, the judgment in MDL 633 should not preclude the state court action because the interests of the absent class members were inadequately protected in the federal action. Finally, because the class representatives dropped their damage claims in the federal action, the subsequent action for damages in Arizona is not barred by *res judicata* principles.[5]

The title insurance companies argued that the class representatives in MDL 633 did not drop their claims for damages even though the class attorneys had informed the district court as much in order to avoid Rule 23(b)(3), Federal Rules of Civil Procedure, certification. On November 30, 1987, the district court entered the injunction as requested by the title insurance companies, ruling that *res*

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[4] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 11a.

[5] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 10a n.2.

*judicata* principles and the doctrine of law of the case supported the injunction.[6] The court also ordered costs assessed against the two school districts.[7] Tucson Unified and Phoenix Elementary appealed from that injunction.[8]

The Third Circuit reversed and remanded with directions that the district court vacate the judgment, noting that it would violate due process for the district court to enjoin the Arizona school boards which have not had minimum contacts with the forum and have not consented to jurisdiction.

## ARGUMENT

Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, SAFECO Title Insurance Company, Stewart Title Guaranty Company, and Ticor Title Insurance Company have filed a petition for certiorari in which they seek review of the court of appeals' holding that if an absent class member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action. Because neither factor was present with respect to the respondent Arizona school districts, the injunction issued by the district court must be set aside. The court of

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[6] Bench Opinion and Order, *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633 (E.D.Pa., Nov. 30, 1987), App. to Pet. at 87a–90a.

[7] Third Circuit order, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 815 F.2d 695 (3d Cir. 1987) (per curiam), App. to Pet. at 76a–77a. The defendants, however, did not file a subsequent bill of costs with the clerk of the district court.

[8] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 8a.

appeals' opinion discusses all pertinent decisions of this Court, creates no new law, and is not inconsistent with any decision of this Court or any court of appeals. For those reasons, the petition should be denied.

### A. The Court Of Appeals Faithfully Adhered To The Standards Set By This Court For Exercising Jurisdiction Over A Party.

For a court to render a decision personally binding on a litigant, it is axiomatic that the court must have personal jurisdiction over the litigant. Personal jurisdiction may be established if the litigant consents to suit in the forum, *National Equipment Rental, Ltd. v. Szuhevil,* 375 U.S. 311 (1964), is domiciled or present in the forum, *Pennoyer v. Neff,* 95 U.S. 714 (1877), or has minimum contacts with the forum, *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). It is undisputed that the Arizona school boards lacked minimum contacts with the distant Pennsylvania district court that enjoined them. And, the court of appeals correctly held that a party does not consent to having the full power of the court levied against it by merely attempting to extricate itself from the court's jurisdiction through an opt out motion. Nonetheless, petitioners argue that this Court's decision in *Phillips v. Shutts,* 472 U.S. 797 (1985), establishes the requisite jurisdiction over these school boards for purposes of enjoining their state court action.

In *Phillips v. Shutts,* this Court held, with respect to damage class actions in which absent plaintiffs are allowed to opt out, that absent plaintiff class members can be bound to a class action judgment even when they lack minimum contacts with the forum. Of course, *Phillips v. Shutts* did not change the well established *International Shoe* minimum contacts standard for exercising personal jurisdiction over defendants. In this context, the issue is whether the district court had personal jurisdiction to enter an injunction against absent class members. That issue is not the same as whether the court had jurisdiction to claim that

absent class members were part of the class. *See* H. Newberg, *Newberg On Class Actions,* § 1.08 (2d ed. 1985). Even when a class action court can say absent members are before the court in the sense that they were part of the class, that does not mean that the absent members are actually before the court for any other purpose, such as for entering an injunction against them, or assessing costs against them, or hearing a counterclaim against them.

In *Phillips v. Shutts,* this Court held that if the forum was to bind an absent plaintiff concerning a claim for money damages or similar relief at law, due process requires that an absent class member plaintiff be provided with an opportunity to opt out of the class. *Phillips v. Shutts,* 472 U.S. at 811, 812. *Phillips v. Shutts* does not provide support for binding these absent school districts that were not allowed to opt out of the class action judgment, much less provide support for subjecting them to *in personam* judgments against them by the distant forum.

> In this case we hold that a forum state may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum state wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation. The notice must be the best practicable. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the Court.

*Phillips v. Shutts,* 472 U.S. at 811, 812. *Shutts* stands for the proposition that absent plaintiff class members that were given the opportunity to opt out and that were adequately represented by the named plaintiff can be bound to a class action judgment; it does not stand for the proposition that they can be enjoined by that distant forum.

The court of appeals correctly noted that "an absent plaintiff is not subject to the burdens of distant forum litigation [prohibited by *International Shoe*] when it is bound to a class action settlement, as long as it can challenge the adequacy of representation in the forum of its choice." App. to Pet. at 18a. Ever since *Hansberry v. Lee,* 311 U.S. 32 (1940), was decided, collateral attacks have been considered to be a necessary part of the class action scheme. "[T]he class members in *Shutts* still possessed their right to attack the class action judgment collaterally, presumably in the forum of their choice, alleging that the representative plaintiff did not represent them adequately." App. to Pet. at 15a.

The court of appeals noted that "the school districts here have lost more than the absent plaintiffs lost in *Shutts,* and yet were given fewer procedural protections." App. to Pet. at 5a. The absent plaintiffs in *Shutts* were still able to challenge the adequacy of class representation in the forum of their choice, whereas, in this case, petitioners would have the school boards enjoined from just such a challenge. The absent plaintiffs in *Shutts* were given the opportunity to opt out and the school boards here were kept in the class action against their wishes. *Id.*

The court of appeals followed this Court's precedents. It did not fashion a new rule of minimum contacts. On the contrary, it faithfully adhered to the jurisdictional standard set by this Court in *International Shoe v. Washington* for exercising jurisdiction over a party to *defend* against an injunction and of *Phillips v. Shutts,* that an absent plaintiff without minimum contacts may challenge the class action judgment by collateral attack and be bound to a class action judgment only if it is given the opportunity to opt out of

the class and only if it is adequately represented by the named plaintiffs. The Third Circuit discussed these authorities and correctly applied them to the improper injunction issued against the Arizona school boards.

### B. The Arizona School Districts Did Not Consent To The Jurisdiction Of The Class Action Forum By Attempting To Opt Out And, When Denied That Right, Appealing The Denial.

The State of Arizona moved to opt out of the MDL 633 class on behalf of itself, its residents, and its political subdivisions. The district court denied Arizona's request to opt out. The State of Arizona filed an appeal in which the issue was whether the district court erred by denying opt outs.[9] Arizona argued that due process is violated if individual damage claims are foreclosed without class members having the opportunity to exclude themselves from a class action settlement. In addition, Arizona pointed out that *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985), on which the district court relied in approving the settlement, has no impact at all on damage claims arising under state antitrust laws; *Southern Motor Carriers* and the state action immunity doctrine only apply to antitrust actions based on federal law. Nonetheless, the class action judgment sought to foreclose consumers even from seeking damages under state laws. Arizona argued that under state antitrust law, consumers in the state have viable claims for damages against the title insurance companies. The class representatives argued before the Third Circuit that Arizona's appeal was an academic exercise and for that reason, the district court's denial of opt outs should be affirmed.[10]

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[9] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation,* 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 8a.

[10] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation,* 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 8a n.1.

The class representatives said that if the denial of opt outs was improper, that issue should be considered in the context of a subsequent action brought to challenge the *res judicata* effect of the judgment in MDL 633.

The Third Circuit affirmed the district court's denial of opt outs without opinion.[11] *In re Real Estate Title And Settlement Services Antitrust Litigation,* 815 F.2d 695 (3d Cir. 1987). Petitioners argue that the issues before this Court were already decided in the first appeal.

The court of appeals correctly noted that the first Third Circuit panel may have affirmed because it decided that Arizona could properly raise its due process claim on collateral attack.

> In this case, the first panel issued the order without opinion. It is possible that that panel was persuaded by the named plaintiff's argument in opposition to Arizona's appeal, that the Court should not grant relief at that point because Arizona could more properly raise its due process claim on collateral attack. See Brief for Plaintiff/Appellees at 39–42. *In re Real Estate Title & Settlement Services Antitrust Litigation,* 815 F.2d 695 (3d Cir. 1987)(No. 86-1450). Unless the title companies can establish that resolution of any of Arizona's due process claims was essential to the first panel's affirmance of the denial of Arizona's motion to opt out, issue preclusion will not bar relitigation of those issues. See *Restatement (Second) of Judgments* § 27 (1982).

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[11] Third Circuit decision, *In re Real Estate Title and Settlement Services Antitrust Litigation,* 869 F.2d 760 (3d Cir. 1989), App. to Pet. at 8a–9a.

App. to Pet. at 9a n.1. In sum, it was argued to the Third Circuit that Arizona should more properly raise its due process claim on collateral attack. Now, petitioners tell this Court that the school boards should be enjoined from the collateral attack because they had their day in court with the first appeal. Petition at 25.

The court of appeals correctly held that the school boards did not "consent to personal jurisdiction to have an injunction levied against [them] if [they] merely appeared in the district court to make a motion to opt out." App. to Pet. at 23a. Moreover, as the Court noted, "it would make little sense to say that parties consent by appealing the denial of such a motion." *Id.*

### C. The Anti-Injunction Act, 28 U.S.C. § 2283, Is Irrelevant Because The Court Of Appeals Determined That The District Court Lacked Personal Jurisdiction Over The Persons Enjoined.

Petitioners contend that the district court did not violate the Anti-Injunction Act, 28 U.S.C. § 2283, because the relitigation exception permits a court to enjoin state proceedings to protect or effectuate its judgments. The court of appeals, having determined that the district court lacked personal jurisdiction to enjoin the Arizona school districts, did not reach the question whether, assuming jurisdiction over the persons to be enjoined, the Anti-Injunction Act would nonetheless prohibit the injunction issued by the district court. Petitioners arguments regarding the relitigation exception are irrelevant unless it is assumed that absence of personal jurisdiction is not an obstacle to enjoining the Arizona school districts.

Although the Anti-Injunction Act, 28 U.S.C. § 2283, allows a federal court to enjoin a state court proceeding "to protect or effectuate its judgments," an injunction against a state court action, in non-class actions, is generally proper only if it is shown that the state action was brought in bad

faith or for harassing purposes. *Laker Airways v. Sabena, Belgian World Airlines,* 731 F.2d 909, 928 n.54 (D.C. Cir. 1984); *Harrelson v. United States,* 613 F.2d 114, 116 (5th Cir. 1980). In the context of class actions, however, it is even clearer that an injunction against a state court action is inappropriate unless there is a showing of bad faith. This is because Rule 23 "plainly contemplated that members of a class would have a right to collaterally attack the judgment which purports to bind them." Note, *Collateral Attack On The Binding Effect Of Class Action Judgments,* 87 Harv. L. Rev. 589 (1974). Under the policy of Rule 23, collateral challenges by absent class members are to test and guarantee that the class was properly represented in the class action. Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 46 (1968). *See also Hansberry v. Lee,* 311 U.S. 32 (1940) (class action judgments are appropriate for collateral review).

Whenever any court is asked to enjoin a proceeding in another forum as a way of enforcing the *res judicata* effect of a judgment, the court must be cautious:

> However tempting it may be for a court to conclude that it is in the best position to assess the preclusive effects of its own judgments, application of preclusion principles requires familiarity not only with the first judgment but also with subsequent proceedings. The first court should not lightly usurp the jurisdiction of another court to dispose of pending litigation.

C. Wright, A. Miller, and E. Cooper, *Federal Practice And Procedure,* § 4405 at 41–42 (1981).

Even more caution is required when a federal court is asked to enjoin a state court proceeding because comity and federalism concerns arise. *Lamb Enterprises, Inc. v. Kiroff,* 549 F.2d 1052, 1062 (6th Cir. 1977). When a federal court is asked to enjoin a state court, even if the request

fits within an exception to the Anti-Injunction Act, that fact does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster,* 407 U.S. 225, 243 (1972). Moreover, an injunction is improper when, as here, the state court claims were not actually decided by the federal court. *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140 (1988).

In arguing that the district court injunction did not violate the Anti-Injunction Act, petitioners ignore the Rule 23 considerations. Moreover, they assume the existence of personal jurisdiction over the Arizona school boards.

### D. The Court Of Appeals' Decision Is Not In Conflict With Decisions Of This Court Regarding Ancillary Jurisdiction.

The court of appeals' decision is not in conflict with decisions of this Court. Petitioners argue that the court of appeals' opinion conflicts with decisions of this Court. However, they cite cases that do not involve due process claims, do not involve class actions, and do not involve personal jurisdiction issues.[12] The only class action case cited as a

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[12] Petitioners' discussion of *Toucey v. New York Life Insurance Co.,* 314 U.S. 118 (1941), is telling. They argue that *Toucey* is particularly significant because,

> one of the two federal injunctions overturned in *Toucey* was issued against proceedings instituted in a distant state court where there was no indication of any basis for personal jurisdiction of the federal court independent of the original lawsuit in which the court's judgment was entered. There, a federal district court in Iowa enjoined five Delaware state court suits brought by *a losing party* in the earlier federal suit. (Emphasis added).

Petition at 15, n.6. That the relitigation exception allows a federal court to enjoin one who was a named party in litigation is not questioned. The court of appeals' decision would not contest personal jurisdiction in that situation. "[A] party should be deemed to consent to personal jurisdiction

decision of this Court with which the court of appeals opinion conflicts is *Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356 (1921). Petition at 12–13. There, the United States District Court in Indiana citing ancillary jurisdiction restrained the prosecution of suits in the Indiana state courts by Indiana citizens who were members of a plaintiff class in an action before the district court. Personal jurisdiction was not at issue in that case. There, this Court held that the District Court has jurisdiction to enforce a decree as against members of the class who were citizens of the same state as the defendant in the class action. The issue was one of subject matter jurisdiction. Specifically, the question was whether the court's jurisdiction which was based on diversity of citizenship was defeated because these class members were residents of the same state as defendant. The case involved an Indiana District Court exercising jurisdiction over Indiana citizens. No question of personal jurisdiction was involved.

Petitioners cite no other authority of this Court that involves a class action and with which they contend the court of appeals is in conflict.

### E. The Court Of Appeals' Decision Is Not In Conflict With Other Court Of Appeals' Decisions.

The court of appeals' opinion is not in conflict with the opinions of other circuits. Petitioners contend that the court of appeals' opinion conflicts with the Fifth Circuit's decision in *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir. 1981). Their argument is incorrect. In *Corrugated,* the district court that heard a class action enjoined absent members of the class from proceeding with a similar action in state court in South Carolina. The district court in that case had personal jurisdiction over the

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if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum." App. to Pet. at 23a.

absent class members to enter the judgment because the absent class members consented to the court's exercise of personal jurisdiction. They consented by entering an appearance in the district court to litigate the merits of the federal class action. Jurisdiction to enter the injunction was not simply based on the fact that the South Carolina plaintiffs were absent members of the federal class action. Instead, jurisdiction to enter the injunction was based on the fact that the South Carolina plaintiffs litigated the merits of the federal class action, and thereby consented to the federal court's exercise of personal jurisdiction.

In *Corrugated,* it was undisputed that the absent class members brought the South Carolina action solely for harassment purposes. An injunction is properly entered to protect against harassing litigation. *See* C. Wright, A. Miller, and E. Cooper, *Federal Practice And Procedure,* § 4405 at 40 (1981). The *Corrugated* court stated, "under these circumstances, the South Carolina court could not be offended by losing the opportunity to entertain a harassing lawsuit." 659 F.2d at 1335.

Nor does the court of appeals' opinion conflict with the Second Circuit's opinion in *Robertson v. National Basketball Assn.,* 622 F.2d 34 (2d Cir. 1980). In that case, Wilt Chamberlain "expressly authorized institution and prosecution of the *Robertson* action on his behalf." *Robertson v. National Basketball Assn.,* 413 F. Supp. 88, 89 (S.D.N.Y. 1976). He received individual notice of the class action, and was invited to intervene. 413 F. Supp. at 89. His attorney participated in arguing the merits of the class action, and Chamberlain accepted the relief provided to him under the class action settlement. In addition, he did not contend that the class representation had been inadequate, or that due process was denied, or that the class settlement was unfair. 622 F.2d at 36. The Second Circuit explained why, under those facts, it was appropriate to enjoin Chamberlain's individual action: "Appellant, who authorized the bringing of the class action on his behalf, whose attorney appeared and argued at the settlement hearing, and who has accepted

part of the settlement proceeds, cannot rightly contend that the district court's judgment had no binding effect as to him." 622 F.2d at 35.

The fundamental purpose behind Rule 23's allowance of collateral challenges to class actions is to provide a check by another court on whether the absent class members were represented adequately and fairly in the class action. Note, *Binding Effect Of Class Actions,* 67 Harv. L. Rev. 1059, 1060 (1954). In Wilt Chamberlain's case, he did not contend that the class had been inadequately represented or that the handling of the class action had been unfair. Accordingly, his case did not even involve the issues in the present case. The Second Circuit's opinion in his case is not in conflict with the present one.

**F. The Court Of Appeals' Decision Is Fact Specific And Is Limited In Its Application.**

The court of appeals did not reach the question whether it is ever permissible for a district court to enjoin an absent plaintiff from relitigation. As the court of appeals emphasized:

> In order to put the matter in perspective, it is important to emphasize that we are not reaching the question whether it is permissible to enjoin an absent plaintiff from relitigation if the absent plaintiff were afforded an opportunity to opt out of the class action. It may be that, in a hybrid class action that involves important injunctive and damage components, a defendant need only consent to a class certification that allows for opt outs in order to avoid due process challenges to the settlement in multiple fora, as long as the court approves that certification. If this is true, creating a minimum contacts requirement that applies to enjoining a plaintiff who was *not* allowed to opt out of a class action could

> make it more likely that, as part of the settlement of a hybrid class action, absent plaintiffs will be given an opportunity to opt out, but it is unlikely to discourage defendants from settling class actions in appropriate cases.

App. to Pet. at 21a.

Moreover, the court of appeals did not decide what procedural protections are required before a court can enjoin a suit by a party who was part of a class action for purely equitable relief. App. to Pet. at 17a.

> The only issue we address is whether an absent class member can be *enjoined* from relitigation if the member does not have minimum contacts with the forum. And on that issue, we hold that, given that the absent member in this case loses more than the plaintiffs lost in *Shutts,* if the member has not been given the opportunity to opt out in a class action involving both important injunctive relief and damage claims, the member must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the class action.

App. to Pet. at 18a–19a.

## CONCLUSION

Here the Arizona school districts did not have minimum contacts with the Pennsylvania forum that enjoined them and assessed costs against them. They did not consent to the court's jursidiction; on the contrary, they attempted to extricate themselves from the class. They were denied the right to opt out of the class despite that the class settlement purported to extinguish their substantial damage claims; they were not given individual notice because notice was given by publication. The court of appeals correctly held that in this case, where the school districts have "lost more than the absent plaintiffs lost in *Shutts,* and yet were given fewer procedural protections," the class members must either have minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court.

The petition for certiorari should be denied because the court of appeals was correct in its decision, it created no new law, and it is not inconsistent with any decision of this Court or any court of appeals.

Respectfully submitted,

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